2 ORIGINAL

No. 01-820

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD REYNOLDS, Superintendent,
Mohawk Correctional Facility,

Petitioner,

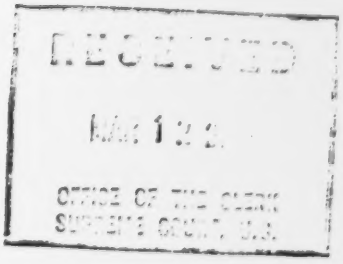
-against-

GEORGE MORRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION



GEORGIA J. HINDE
Attorney for Respondent
George Morris
220 Fifth Avenue, 7th Floor
New York, New York 10001
(212) 727-2717

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STATEMENT OF THE CASE

We offer in the following statement somewhat more detail than usual because of the singular and sometimes disturbing facts that were presented by this case, the likes of which neither petitioner nor respondent has found in any other reported decision. Also, the details that follow, coupled with the full and accurate factual statements found in the decisions of both the reviewing magistrate judge (Appendix C to Petition (hereafter "Pet. App.")) and the Court of Appeals (Pet. App. A), will afford this Court a basis to assess respondent's objections below to facts incorrectly assumed by or asserted in petitioner's questions presented, statement of the case, and arguments.

A. State Court Proceedings

In December 1993, state authorities charged respondent George Morris with unlawfully possessing a firearm in violation of both a state felony statute that prohibits possession of a weapon outside of one's home or business (New York Penal Law § 265.02), and a lesser included misdemeanor statute prohibiting any possession of a firearm, wherever it occurs (New York Penal Law § 265.01).[1] As noted by petitioner (Petition at 2 n.1), both of these charges arose from a single occasion when Mr. Morris possessed a pistol "while inside a store".

During pretrial proceedings, the defense moved to inspect the grand jury minutes and dismiss the indictment. The prosecution opposed the motion. After the trial court reviewed the grand jury

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[1] That these two charges represent greater and lesser included offenses has been established by New York's highest court. See Matter of Johnson v. Morganthau, 69 N.Y.2d 148, 152 (1987).

minutes, it announced, for the first time on May 10, 1994, the dismissal of the single felony charge in the indictment. The court repeated this oral ruling when the parties next appeared on June 7, 1994, and explained the reason for dismissal: that "the People have not established sufficiently the home and business exception" required to support the felony charge. At the conclusion of this second appearance, both the prosecution and defense indicated their readiness to proceed on the next adjourn date with the remaining misdemeanor charge.

At this point, state law (New York C.P.L. § 210.20) allowed the prosecution three options: it could either appeal the court's dismissal order, request an opportunity to represent its evidence to a grand jury in an effort to overcome the earlier insufficiency, or accept the dismissal ruling and proceed with the remaining charges. Here, the prosecution did nothing to pursue either of its first two options. Indeed, unlike defense counsel, who requested a copy of the court's written dismissal decision on June 7, 1994,[2] the prosecution never asked to see the court's written decision at this or any other point in time when the court was still in a position to correct any arguable error or withdraw the decision. The only reasonable view of this record, therefore, was that the prosecution had chosen its third option: it accepted the court's dismissal of the felony charge and intended to proceed solely on the remaining misdemeanor charge.

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[2] When defense counsel asked for a copy of the decision, the court told her to "get a copy from the clerk" as there was "probably" one in the file already. Defense counsel accordingly applied to the court clerk for a copy, and the clerk promised to send one to her office, but never did.

This view is consistent with events at the next appearance on August 1, 1994. After the court again confirmed that the "only count here is [misdemeanor] criminal possession of a weapon in the fourth degree", the court entertained a defense application to accept respondent's guilty plea in exchange for a sentence of probation, indicating that it was "inclined to accept that plea and give [the defendant] a misdemeanor probationary sentence", in light of Mr. Morris' current employment (as owner and operator of a neighborhood record store) and the lack of any other basis to require his incarceration. Induced by this judicial inclination, the defense formally offered to plead guilty to misdemeanor gun possession, a charge the court again confirmed was the sole "remaining count" in the indictment. The prosecutor reserved her right to make a recommendation at the time of sentencing, but made no objection to entry or acceptance of the guilty plea.

The court then placed the defendant under oath and elicited his admissions to "this remaining charge". The court also invited the prosecution's recitation of evidence it would have presented had the case gone to trial. After assuring that the prosecution required no additional admission from the defendant, the court accepted the defendant's guilty plea, unconditionally promised that he was "going to get a probationary sentence of three years", and elicited the prosecution's record agreement that the defendant's guilty plea had disposed of the remaining indictment.

From this point on, these unremarkable state court proceedings became highly irregular. First, after the court already accepted the defendant's plea and the matter was adjourned for sentencing, the prosecutor finally decided to ask for a copy of the court's

dismissal order.[3] The court's law clerk then surprisingly informed the prosecutor that, while the written decision was even then "not completed", it would reflect that, contrary to the trial judge's oral pronouncements at three prior proceedings, the grand jury evidence was sufficient to sustain both charges in the indictment.

In the face of this astounding news, the prosecutor apparently did nothing but await the court's written decision. More time passed, some "several days" according to the prosecutor,[4] before the court ultimately issued an altogether ordinary "short-form" written order that indeed denied the defendant's motion to dismiss. And despite the law clerk's advice to the prosecutor that this decision was "not completed" on August 1, 1994 -- after the court had already accepted the defendant's guilty plea earlier that day

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[3] Petitioner has repeated an assertion that the prosecutor also asked for a copy of the court's written decision before the defendant's guilty plea, in an "off-the-record conversation" (Petition at 3). The state record contains, however, other instances when the prosecutor readily repeated her off-the-record statements for the record (e.g., "as previously stated, I will reserve my right to make a sentencing recommendation for the date of sentence", emphasis added). Thus, nothing prevented the prosecutor from similarly repeating and making a record of anything else she may have said off the record.

In any case, the reviewing state appellate courts did not adopt this attempt to amend the record, made for the first time months after the fact during prohibition proceedings initiated by respondent to prevent the trial court's untimely attempt to reinstate the dismissed felony charge. During the federal habeas proceedings, moreover, the Court of Appeals expressly found nothing in the record that would permit assessment of this off-the-record claim (Pet. App. A at 16a). Rather, the Court of Appeals agreed that the "transcript is quite clear: at no time during the plea allocution did the prosecutor object to the plea"; and the "trial justice accepted Morris' guilty plea to the misdemeanor with the prosecutor's approval, or at least without objection by the prosecution" (Pet. App. A at 16a).

[4] Defense counsel was not informed anything about these extraordinary developments, despite their obvious importance to her client, until some five weeks after the defendant's guilty plea.

-- the order was apparently backdated to the preceding Friday (July 29, 1994), in a none too subtle attempt to avert the blatant double jeopardy difficulties that had attached from the moment the court accepted the defendant's valid guilty plea.

No one has ever disclosed what went on off the record to bring things to this pass. The record merely shows that, five weeks after the court induced the defendant to forego his trial rights in favor of his substantial interest in finality -- an interest well expressed in the court's promise that the defendant's guilty plea to "this misdemeanor" would permit him "to serve the probationary sentence, get it over with and start anew" -- the prosecution first informed defense counsel about the court's written order upholding the felony charge after all. The prosecution also indicated that it would be moving to vacate the defendant's guilty plea because of the court's order -- but it never did so.

At the next appearance on October 21, 1994, the defendant therefore announced his readiness for sentencing. In response, the court itemized the rather significant changes that had quietly taken place since the defendant entered his guilty plea almost three months earlier: first, that "[a]fter review, [felony] Criminal Possession of a Weapon in the Third Degree is reinstated",[5] and second, that the court would therefore allow the defendant "in fairness" to withdraw his guilty plea because it had

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[5] Petitioner reports that "the court vacated respondent's misdemeanor plea and reinstated the Criminal Possession of a Weapon in the Third Degree felony count" at this proceeding (Petition at 3). This is not what the record shows, as the Court of Appeals agreed (Pet. App. A at 4a n.1). Instead, the court reinstated the felony charge without vacating the lesser included misdemeanor conviction after the defendant refused to withdraw his guilty plea.

been "obviously made under the impression that that [charge] had been . . . dismissed".

The court offered no reason for reinstating the felony charge beyond its general assertion that "[w]hen the matter was reduced to the written decision", the judge had found the earlier dismissal somehow "incorrect", and the court, "realizing its own error, corrected itself".[6] The court also stood by the telling fiction that its written decision had been "issued" on July 29, 1994, three days before this same judge accepted the defendant's guilty plea to what the court had expressly recognized at the time was the sole "remaining count" in the indictment.[7]

After refusing to withdraw his guilty plea, respondent asked the state appellate courts to enforce his double jeopardy right not to be twice prosecuted and convicted of the same offense -- or in this case, not to be successively prosecuted for a greater offense following his valid conviction of a lesser included offense that was the only pending charge at the time of his conviction. Without addressing the express federal double jeopardy ramifications in

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[6] Nothing in the decision itself sheds any light on the court's reasoning. All the boilerplate decision said was that, based on the court's review of the grand jury minutes, "The credible evidence educed [*sic*] from the Grand Jury is legally sufficient to sustain the indictment. Moreover, this Grand Jury proceeding is not, in any manner, defective. Therefore, the motion is dismissed."

[7] Commendably, petitioner no longer presses the argument that the backdated court order demonstrates that the felony count was still pending at the time of the defendant's guilty plea. Yet without an argument that it had been a "mistake" to accept the defendant's guilty plea to the sole remaining charge in the indictment -- an argument that depended on the pendency of the other charge -- there was no other basis for the court to upset the defendant's valid and binding guilty plea that the court lawfully accepted under the conditions as they existed at the time.

this application,[8] the lower appellate court majority agreed with respondent that the court could not withdraw its earlier decision dismissing the felony count, nor reinstate that felony charge after "full agreement [had] been reached" with the defendant's valid guilty plea, and when there had been "no change in circumstances" undermining the defendant's entitlement to "the benefit of the bargain" (Pet. App. E at 99a). The lower appellate court also specifically found that, "[a]t the time of the plea the People raised no objection and did not contend that it could not be in full satisfaction of the charge" (id.).[9]

Petitioner appealed this decision to New York's highest court. Again without any express mention of double jeopardy principles, the New York Court of Appeals reversed the lower appellate court in a brief memorandum decision that permitted the trial court to reinstate the dismissed felony charge on the rationale that "trial

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[8] The only mention of double jeopardy in any state opinion occurred in the lower appellate court's dissenting opinion (Pet. App. E at 104a), when two state judges opined that, "since the proceeding did not 'terminate' in a 'judgment' -- a conviction and sentence imposed thereon . . . but only in a 'conviction' by virtue of a guilty plea . . . the Double Jeopardy Clause of the United States Constitution is not offended" (citations to state statutes omitted). Apart from the inaccuracy of this opinion under federal law, it does not even appear to be a consistently applied rule under state law. Compare People v. Minaya, 54 N.Y.2d 360, 366 (1981) (no double jeopardy bar to court exercising inherent power to correct mistakenly imposed sentence) with Matter of Campbell v. Pesce, 60 N.Y.2d 165, 167 (1983) (court has no inherent power to vacate illegal plea after sentence imposed).

[9] This and other factual determinations of New York's intermediate appellate courts control under applicable state law. New York's highest court has limited jurisdiction, and therefore lacks the "authority to weigh conflicting evidence and make its own factual determinations" after an appellate division has done so on a record containing adequate factual support for its conclusions. Dalton v. Educational Testing Service, 87 N.Y.2d 384, 391 (1995). Federal habeas courts equally owe such adequately supported state factual findings the same deference.

courts in criminal cases have the general inherent authority to correct their own mistakes" at any time prior to sentencing (Pet. App. D at 96a). None of the court's own decisions cited in support of this premise dealt, however, with any set of circumstances remotely comparable to those presented here (as noted below).[10]

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[10] The court cited four of its own decisions, each dealing with the scope of a trial court's "inherent power to correct its own error". First, in People v. Bartley, 47 N.Y.2d 965, 966 (1979), the defendant had not pleaded guilty to the only pending charge in the indictment, but to a single charge in satisfaction of all remaining pending charges -- a disposition the defendant later conceded was not permitted by statute for the offenses at issue, and therefore was erroneous as a matter of law. Because the court's acceptance of the defendant's plea was therefore invalid ab initio as a matter of law, there had been no prior conviction to raise double jeopardy concerns, and the court held that reinstatement of the entire indictment was a permissible exercise of the trial court's "inherent power to correct its own error".

Next, in Matter of Kisloff v. Covington, 73 N.Y.2d 445, 450-52 (1989), the court designated a limitation on a trial court's "inherent power" by prohibiting a court's ability to vacate a guilty plea and sentence, even though both were illegal products of mutual mistake: "a court which has accepted a plea in violation of the Criminal Procedure Law may not vacate the illegal plea and reinstate the original charges after sentence has commenced". In so holding, the court followed one of its own earlier decisions, also cited in respondent's case, Matter of Campbell v. Pesce, 60 N.Y.2d 165, 168-69 (1983), upholding a conviction premised on an illegally accepted guilty plea because there "exists no statutory authorization for the court to vacate the plea and sentence at the prosecutor's request and reinstate the original charges."

Despite these decisions that appear to flatly prohibit an exercise of a court's inherent powers to correct mistakes after sentencing, the other decision cited in respondent's case, People v. Minaya, 54 N.Y.2d 360, 364 (1981), allowed a court to wield its inherent powers even after sentencing, by permitting the correction of a mistakenly imposed sentence that did not conform with the sentence promised as part of his plea agreement.

None of these decisions involved the unique circumstances here: a trial court's acceptance, without any objection by the prosecution, of a defendant's valid and lawful guilty plea to the only remaining charge in the indictment, only to have the trial court later change its mind and attempt to reinstate a previously dismissed felony charge after jeopardy had attached at the moment of the defendant's conviction.

Ultimately, after New York's highest court failed to protect this defendant's right to repose and finality that should have followed his validly accepted admission of guilt, respondent was forced to face a successive prosecution for this greater offense. On June 4, 1997, respondent pleaded guilty to this charge as well, this time in exchange for substantially longer sentence of 2½ to 5 years. He then filed the timely habeas application that is the subject of this petition.[11]

B. Federal Habeas Proceedings

Finding substantial merit in respondent's habeas petition, both the reviewing magistrate judge and the Court of Appeals agreed that the state court violated clearly established double jeopardy precepts by permitting respondent's successive prosecution on a greater charge after his valid conviction upon his guilty plea to a lesser included offense. Only the district court's intervening decision reached a different conclusion -- but it did so on the basis of unsupported factual findings that the Court of Appeals later agreed were clearly erroneous (Pet. App. A at 14a).

In particular, the Second Circuit's unanimous and carefully reasoned decision demonstrated the error in two important facts on which the district court's decision mistakenly relied. First, despite the trial judge's later improper attempt to insinuate that

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[11] Respondent surrendered to begin his term of imprisonment immediately after his June 1997 guilty plea. He had accumulated sufficient good time credits to mandate his release from prison in October 2000, while his federal appeal was still pending. His entire sentence would have expired in June 2002, about seven months after the Court of Appeals revised its mandate to direct vacatur of the improper felony conviction and reinstatement of the misdemeanor conviction, instead of respondent's "immediate release[] from state confinement" (Pet. App. A at 22a), as that had already occurred.

the defendant's plea was invalid because an order sustaining the felony charge had "issued" three days prior to the defendant's guilty plea, the Court of Appeals found no charge pending other than the misdemeanor at the time the state court unconditionally accepted respondent's guilty plea (id. at 14a-16a). There was, therefore, nothing illegal or invalid about the defendant's voluntary and adequate guilty plea when accepted by the court.

Second, the prosecution never objected to the defendant's entry or the court's acceptance of the defendant's guilty plea to the sole pending misdemeanor charge (id. at 14a) -- just as it had not objected to the trial court's rulings dismissing the felony count of the indictment, nor resorted to its available remedies of appealing the court's ruling or requesting leave to represent the charge to the grand jury, as the Court of Appeals agreed in its discussion of the chronology of events. See id. at 5a (prosecutor did not object after court's original oral ruling dismissing felony charge); id. at 6a (no prosecution objection when court explained basis for dismissal, nor when court indicated prior to accepting defendant's plea that only charge pending was misdemeanor, nor when court accepted defendant's guilty plea); id. at 14a ("government did not object to entry or acceptance of the misdemeanor plea in this case"); id. at 16a ("at no time during the plea allocution did the prosecutor object to the plea", and record as a whole "supports a finding that the trial justice accepted Morris's guilty plea to the misdemeanor with the prosecutor's approval or at least without objection by the prosecution"). This Court should therefore accept these factual findings of the Court of Appeals that petitioner has

not challenged, except indirectly in portions of its arguments and questions presented to which we object below.

As for the Court of Appeals' legal conclusions, each depended on a fair and restrained application of this Court's clearly established precedents. The decision comprehensively speaks for itself, but we discuss briefly below the manner in which the Court of Appeals' decision carefully and correctly applied this Court's controlling constitutional caselaw to the unusual facts in this case. In so doing, the Second Circuit deferentially credited New York's highest court with an implicit constitutional analysis of the federal double jeopardy issue, despite the state court's failure to remark expressly on any subject besides the inherent powers of trial courts to correct mistakes up to -- and sometimes after -- a defendant's sentencing.

No decision of this Court suspends the protections of the Double Jeopardy Clause until after sentence has been imposed and judgment entered. Moreover, this Court has already clearly established that Double Jeopardy bars a defendant's successive prosecution on a greater offense after he has been already convicted of a lesser included offense, even in the case of a conviction by guilty plea when the prosecution has not objected to entry or acceptance of the plea while no other charges are pending. Accordingly, as discussed below, the questions proffered by petitioner do not call for this Court's review, and the Court should deny *certiorari*.

OBJECTIONS TO CONSIDERATION OF PETITIONER'S QUESTIONS AND STATEMENT OF THE CASE AS PRESENTED

Before discussing the reasons why the Court should deny review, we itemize briefly respondent's objections to unsupported facts expressed or implied in petitioner's questions, statement of the case, and arguments.

1. Petitioner has framed its first question (Petition at i) and ensuing argument (Petition at 10) in part on the premise that the trial court accepted respondent's guilty plea "without the consent of the prosecution". Petitioner has similarly argued that the trial court erred in accepting respondent's guilty plea "without the encouragement or consent of the prosecution" (Petition at 9, 11). Under New York law (New York C.P.L. § 220.10(2)), however, a defendant has a statutory right to plead guilty to all charges pending in an indictment at the time of the guilty plea, whether the prosecution consents or not. Accord People v. Moquin, 77 N.Y.2d 449, 453-54 (1991) (prosecutor's consent not required to accept guilty plea to all remaining counts even when dismissal of top count later held to have been in error; underlying guilty plea still valid and cannot be set aside). Petitioner's failure to "consent" to or otherwise "encourage" the defendant's exercise of his statutory right to plead guilty to the only pending charge against him therefore did not undermine the validity or lawfulness of the trial court's acceptance of respondent's guilty plea.

2. More relevant to the double jeopardy issue is whether or not the state ever objected to accepting respondent's guilty plea. Petitioner quotes the district court's conclusions on this subject

(Petition at 8) -- but again, as detailed above, any suggestion that petitioner implicitly objected to the defendant's guilty plea has been and should be rejected as clearly erroneous (Pet. App. A at 14a, 16a). Further, as the prosecution's failure to object to the trial court's acceptance of respondent's guilty plea is a fact the state appellate court has already found (Pet. App. E at 99a), it warrants federal deference.

3. Petitioner argues that the state was denied an opportunity to convict respondent of the felony charge when the trial court accepted his guilty plea to the lesser included misdemeanor charge after dismissing the felony count "but before the State could exercise any appellate remedies". Respondent objects to this suggestion because almost three months passed between the date the state court first announced dismissal of the felony charge (May 4, 1994), and the date the court accepted respondent's guilty plea (August 1, 1994). That amount of time was more than sufficient for petitioner either to file its notice of appeal (required within the first 30 days after dismissal); or at least to have requested a copy of the court's written order or further details about the basis for dismissal;[12] or at a minimum to have notified the court on the record that no plea should be accepted while the state was

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[12] As noted above (note 3), petitioner's renewed suggestion -- that the prosecution did request a copy of the court's decision in an unrepeated off-the-record conversation just before the defendant entered his guilty plea (Petition at 3) -- has no support in the record, and is a claim that the Court of Appeals therefore had "no way of assessing" (Pet. App. A at 16a). Also, neither of the reviewing state appellate courts adopted this contention made for the first time during the state appeals.

considering whether or not to appeal or request leave to represent the dismissed charge.

4. Finally, petitioner's first question presented (Petition at i) and ensuing discussion (Petition at 3, 10, 11) misstate the issue slightly, as the Court of Appeals has already noted (Pet. App. A at 4a n.1): the record does not show that the state court ever vacated respondent's guilty plea before reinstating the greater felony charge and allowing the defendant's successive prosecution for the same offense, despite his valid and lawful prior conviction of the lesser included misdemeanor on which the state court simply refused to impose the promised sentence.

REASONS FOR DENYING THE WRIT

I. Federal Double Jeopardy Principles On Which The Circuit Court's Decision Properly Relied Are Both Clearly Established And Prohibited This Defendant's Successive Prosecution

The unanimous decision of the Court of Appeals for the Second Circuit rests on well understood double jeopardy principles long and clearly established in this Court's decisions. First, the Court of Appeals recalled that one of three main protections afforded by the Double Jeopardy Clause is the protection against "a second prosecution for the same offense after conviction" (Pet. App. A at 17a, quoting Ohio v. Johnson, 467 U.S. 493, 498 (1984)) -- a protection recognized by this Court as "a constitutional policy of finality for the defendant's benefit." Brown v. Ohio, 432 U.S. 161, 165 (1977). Second, the Court of Appeals confirmed that this Court has long considered the entry and acceptance of a

valid guilty plea as a "conviction" no less than those resulting from a jury's verdict (Pet. App. A at 17a, quoting Kercheval v. United States, 274 U.S. 220, 223 (1927) (a guilty plea "is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence")).

Based on these decisions, the Court of Appeals reasonably proceeded from the logically inevitable premise that double jeopardy "prohibits a second prosecution for the same offense following a guilty plea" (Pet. App. A at 18a). The Court next looked to this Court's decision in Brown v. Ohio, supra, 432 U.S. at 168, and confirmed that the constitutional prohibition against successive prosecutions for the "same offense" also prohibits successive prosecutions for lesser included and greater offenses. Finally, the Court of Appeals factored into its analysis one of this Court's significant exceptions to the prohibition against successive prosecutions: that a defendant will not enjoy the same "constitutional policy of finality" from pleading guilty to a single charge when other charges are still pending against him at the time of his guilty plea, and when the prosecution objects to the disposition of any pending counts without a trial (Pet. App. A at 19a, discussing Ohio v. Johnson, supra, 467 U.S. at 500-02).

Using these clearly established precedents, the Court of Appeals fairly concluded that "the Supreme Court has established that, after a court accepts a defendant's guilty plea to a lesser included offense, prosecution for the greater offense violates the Double Jeopardy Clause" (Pet. App. A at 19a). Further, after

incorporating the exceptions recognized in Johnson, the Court of Appeals held that "the double jeopardy bar arises, after a conviction but before sentencing, when a defendant pleads guilty to a lesser included offense, the prosecution did not object to the plea, and there was no greater offense pending at the time the plea was accepted" (Pet. App. A at 21a).

With the parameters of controlling federal law thus clearly defined, the Court of Appeals next identified the substantial flaw in the state court's decision -- a decision, again, that made no express mention at all of double jeopardy principles, instead apparently deciding the appeal on the basis of state law policies that typically permit trial judges to correct their mistakes up to the moment of sentencing. That flaw was the New York Court of Appeals' implicit view that a defendant cannot enjoy the protection of the Double Jeopardy Clause until he has been, not only lawfully convicted, but sentenced (Pet. App. A at 21a).[13]

While one component of double jeopardy protection necessarily arises only in connection with sentencing -- the protection against

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[13] This misstatement of double jeopardy law also appeared expressly (albeit without any pertinent analysis or discussion) in the dissenting opinion of the state's intermediate appellate court (Pet. App. E at 104a, opining that "the Double Jeopardy Clause of the United States Constitution is not offended" if a court vacates a mere "conviction" prior to sentencing and entry of judgment).

It may be that New York courts have been conditioned to look to the moment of sentencing as the critical point in the proceeding because of a statute (New York C.P.L. § 430.10) that prohibits the alteration of a lawfully imposed sentence "once the term or period of the sentence has commenced". This statute does not, however, address double jeopardy considerations generally, or the particular constitutional concerns that can arise even before sentencing in the context of an attempted successive prosecution after a valid conviction of the same or a lesser included offense.

"multiple punishments for the same offense", North Carolina v. Pearce, 395 U.S. 711, 717 (1969) -- this Court's above decisions have never required entry of judgment at the time of sentencing to animate the double jeopardy prohibition against successive prosecution after acquittal or conviction of the same or a lesser included offense. See also Sanabria v. United States, 437 U.S. 54, 74 (1978) ("The Double Jeopardy Clause is no less offended because the Government here seeks to try petitioner twice for this single offense, instead of seeking to punish him twice"); Serfass v. United States, 420 U.S. 377, 389 (1975) (former jeopardy attaches as soon as defendant faces a "risk of a determination of guilt" at the point when court began to hear evidence and is in a position to determine the defendant's guilt or innocence); United States v. Ball, 163 U.S. 662, 671 (1896) ("a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense").

The Court of Appeals therefore fairly concluded that the state court applied a rule contrary to those established by this Court's precedents when sanctioning successive prosecutions in any case where the defendant had not yet been sentenced on an original and valid conviction. In so holding, moreover, the Court of Appeals carefully complied with this Court's interpretation of the standards for granting habeas relief, 28 U.S.C. § 2254(d)(1), in Williams v. Taylor, 529 U.S. 362 (2000).

As Justice O'Connor explained for the Court in Part II of her concurring opinion, a state court decision will be "contrary to" controlling Supreme Court precedent and support federal habeas

corpus relief if it was "substantially different from the relevant precedent of this Court" or otherwise "contradicted the governing law". Id. at 405. Here, the Court of Appeals rightly held that the state court's decision "contradicts the governing law" clearly established by this Court's decisions in Kercheval, Brown, and Johnson, because it failed to prohibit a successive prosecution after a defendant's valid conviction (by means of a guilty plea at a time when no greater offense was pending against him, and to which the prosecution interposed no objection) of a lesser included offense simply because the defendant had not yet been sentenced (Pet. App. A at 20a-21a).

There is, therefore, no need for this Court to review this case as a means of "clarifying" the already well established double jeopardy prohibition against successive prosecutions, as petitioner suggests (Petition at 9). Nor is review necessary because this Court has not previously addressed this identical "legal scenario" (Petition at i, 10, 12). As Justice O'Connor recognized for the Court in Williams, supra, 529 U.S. at 406-09, state courts are not excused from following a clearly established framework for determining a constitutional issue simply because some facts are different than those in the Court's decisions creating that framework. Instead, if a state court has "unreasonably refuse[d] to extend" a clearly established principle "to a new context where it should apply", that too can support federal habeas relief as an "unreasonable application" of clearly established precedent. Id.

Thus, as this Court's clear line of decisions requires neither clarification nor supplementation to reach the same conclusion as already found by the Court of Appeals, *certiorari* should be denied.

II. Petitioner Has Identified No Compelling Reason To Call For This Court's Additional Review Of The Singular Circumstances In This Unique Case

Apart from urging this Court's unnecessary "clarification" to an already well-contoured body of double jeopardy law that is more than adequate to address the circumstances here, petitioner also argues that the Court should review this case because the decision of the Court of Appeals is in "direct conflict" with a decision of New York's highest court, a circumstance petitioner expects will "create uncertainty with respect to any number of convictions from New York," leaving "the state of the law in this important constitutional field . . . confused and chaotic" (Petition at 12). Petitioner also asserts that the decision of the Court of Appeals did not "show proper deference" to New York courts when finding the state proceedings in this case infected by constitutional error (Petition at 13).

Neither rationale affords any better reason for this Court to review the entirely unique circumstances of this case. First, the decision of the Court of Appeals cannot meaningfully "conflict" with the decision of New York's highest court when the state court did not discuss the double jeopardy question at all, and instead resolved the appeal on the basis of a trial court's inherent power to correct its mistakes. The federal Court of Appeals in fact "agree[d] that a state court has the power to correct its own errors" unless such correction "infringes a defendant's rights under the Double Jeopardy Clause to finality and repose" (Pet. App. A at 20a). New York's highest court is typically of the same opinion. See Matter of Lockett v. Juviler, 65 N.Y.2d 182, 187

(1985) (permitting courts to vacate fraudulently obtained guilty plea "provided there is no constitutional impediment"); People v. Moquin, supra, 77 N.Y.2d at 452 (collecting cases permitting court to vacate final criminal judgment "in the absence of a specific constitutional impediment"). Moreover, when the New York Court of Appeals expressly considered, in Johnson v. Morgenthau, 69 N.Y.2d 148, 150-51 (1987), the double jeopardy implications of another defendant's successive prosecutions for possessing the same weapon in two different counties after the defendant had pleaded guilty to the offense in one of the counties, the state court agreed the second indictment had to be dismissed under the authority of this Court's decision in Brown -- one of the same decisions on which the Court of Appeals relied here.

In cases where the New York Court of Appeals has expressly addressed the double jeopardy question, therefore, its opinions do not conflict with controlling federal precedent in the least. Accordingly, the fact that New York's highest court implicitly may have decided the constitutional question in error in this case poses no prospect of the "confusion" or "chaos" petitioner forebodes (Petition at 12) -- particularly given the minimal reliance to date on the authority of Van Leer-Greenberg ex rel. Morris v. Massaro, 87 N.Y.2d 996 (1996).

For its part, the New York Court of Appeals has never cited this decision for any purpose. Moreover, in its six years on the books, the decision has only garnered brief mention in five lower state court decisions, none of which decided a double jeopardy question. See People v. Wroten, 286 A.D.2d 189, 196 (4th Dept.

2001) ("court has inherent power to correct its own order to rectify a mistake of fact or law"); People v. Rosen, 267 A.D.2d 28 (1st Dept. 1999) (when court could not keep sentencing promise due to defendant's psychological report, proper to set aside plea and schedule trial if defendant did not object); People v. Lucatuorto, 261 A.D.2d 931, 932 (4th Dept. 1999) (permitting court to correct omission by announcing verdict on one count several days after conclusion of bench trial because "trial courts in criminal cases have general inherent authority to correct their own mistakes"); Kurz v. Justices of the Supreme Court, 228 A.D.2d 74, 77 (2d Dept. 1997) (courts have no inherent authority to set aside guilty plea without defendant's consent except to correct own mistakes; but when no error to accept plea, court acts in excess of authority to vacate plea prior to sentencing); People v. Tejada, 184 Misc.2d 75, 77 (Bronx Sup. Ct. 2000) (court has inherent authority to vacate statutorily prohibited guilty plea prior to sentencing).

Petitioner's suggestion that any "direct conflict with the New York Court of Appeals will create uncertainty with respect to any number of convictions from New York" (Petition at 12) is therefore utterly unsupported, even apart from petitioner's inability to cite a single example of such impending uncertainty. Moreover, as we learned through the course of the federal proceedings, in no other decision has a state or federal court considered anything close to the peculiar circumstances that were presented by this case. The decision of the federal Court of Appeals -- while obviously important to respondent, and also a significant application of this Court's double jeopardy decisions -- is therefore unlikely to

affect the outcome of any pending or future federal habeas petition.[14]

Finally, contrary to petitioner's assertion that the Court of Appeals did not show "proper deference" to the state court's decision (Petition at 13), the Court of Appeals actually afforded the state court's terse memorandum decision the most deferential consideration possible. After all, the Court of Appeals inferred the state court's implicit consideration of the constitutional issue even when the state court discussed nothing more than a generic state policy that typically permits a trial court to correct its mistakes up to the time of sentencing. Having thus credited the state with undertaking the requisite constitutional analysis, the Court of Appeals then fairly concluded that the state court had reached a conclusion that could not be harmonized with controlling decisions of this Court. This remains the role of

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[14] The decision of the Court of Appeals has been cited by ten district court decisions to date, but none has relied on the Second Circuit's double jeopardy analysis. Three decisions pointed to the Second Circuit's discussion of the amended habeas statute's standards of review, Gonzalez v. Bennett, 2001 U.S. Dist. Lexis 19798 (S.D.N.Y. Nov. 30, 2001); Gonzalez v. Reiner, 177 F. Supp. 2d 211 (S.D.N.Y. 2001); Alvarez v. Fischer, 170 F. Supp. 2d 379 (S.D.N.Y. 2001); five decisions relied on the Second Circuit's discussion of the statutory requirement that the presumption of correctness of state court factual findings must be rebutted by clear and convincing evidence, Banchs v. Levine, 2001 U.S. Dist. Lexis 21638 (S.D.N.Y. Dec. 27, 2001); Correa v. Duncan, 172 F.Supp.2d 378 (E.D.N.Y. 2001); Ballard v. Costello, 2001 U.S. Dist. Lexis 18596 (E.D.N.Y. Nov. 2, 2001); Davis v. Portuondo, 2001 U.S. Dist. Lexis 17120, 17194 (S.D.N.Y. Oct. 23, 2001); Legree v. Greiner, 2001 U.S. Dist. Lexis 16625 (S.D.N.Y. Oct. 17, 2001); and two decisions relied on the Second Circuit's discussion of the statutory "adjudicated on the merits" requirement that can be satisfied when a state court has referred to federal law in similar cases, Rodriquez v. Miller, 2001 U.S. Dist. Lexis 17659 (E.D.N.Y. Oct. 22, 2001); Shaw v. Artuz, 2001 U.S. Dist. Lexis 17069, 17143 (S.D.N.Y. Oct. 19, 2001).

federal courts even under the more restrictive provisions of present habeas law, as this Court has agreed in Williams, supra, 523 U.S. at 405 (if "state court applies a rule that contradicts the governing law set forth in our cases" its "decision will certainly be contrary to our clearly established precedent" and habeas relief will be warranted).

Accordingly, this Court should find no compelling interest presented by petitioner's arguments, and should decline to review the altogether forthright and well reasoned decision of the Court of Appeals.

III. Even If Controlling Legal Issues Were Less Clearly Established, Other Factors Make This Case Inappropriate For This Court's Review

As discussed, the decision of the Court of Appeals is not only a fair and correct application of this Court's clearly established double jeopardy precedents, but it does not meaningfully conflict with any state court decision that has expressly considered similar issues. Even if the legal issues were less certain, however, the particular facts of this case make it an inappropriate candidate for this Court's *certiorari* review.

First, as this Court knows, "odd and unusual" cases like this "will afford little guidance as precedent" for other atypical but appropriate applications of the Double Jeopardy Clause. Sanabria v. United States, supra, 437 U.S. at 80 (Blackmun and Rehnquist, JJ., dissenting). Moreover, this Court's existing precedents are already sufficient to answer the questions posed by this peculiar case, as well demonstrated by the decision of the Court of Appeals, so no additional review is required to bridge any gaps.

As for petitioner's assertion that a "leap-frogging divergence of opinion" during the course of the state and federal proceedings shows that the legal issue requires clarification (Petition at 11-12), the reasons for divergence make this circumstance unremarkable. Two of the courts that decided the issue against respondent -- the state trial court and the federal district court -- did so on the basis of clearly erroneous facts, and the third state appellate court did not expressly consider double jeopardy in any fashion. The sequence of rulings for and against respondent therefore signifies nothing meaningful about the issues of law fairly decided by the Court of Appeals.

Another reason this case should not take up any more of this Court's time is the disturbing conduct of the state trial court that launched the whole controversy: the still unexplained change of heart that led the trial court to reinstate the dismissed felony count after accepting the defendant's valid and lawful guilty plea. Petitioner asserts that "[o]bviously, the trial court did not believe Double Jeopardy provisions would be violated when it . . . reinstated the felony count"[15] after the court supposedly suffered a mere "lapse in the trial court's record keeping and organization" (Petition at 11). Nevertheless, when the state court backdated its reinstatement order to reflect a date a few days prior to the defendant's guilty plea, it demonstrated a disturbing willingness to skirt the constitutional barrier to reinstatement of the felony charge that the court itself had allowed to be created by the

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[15] We have omitted the portion of petitioner's argument that again contends that the trial court also "vacated the guilty plea" because that did not occur, as discussed above.

intervening entry and acceptance of respondent's valid guilty plea. What appears to have "lapsed" in this case was therefore something far more fundamental than "record keeping and organization", and on this account as well, this Court should shun further review of the issues presented.

Finally, as noted above, George Morris had already served the entirety of his prison sentence and most of his parole term by the time the Court of Appeals granted habeas relief. Just as a state's interest in continuing a successful habeas applicant's custody and rehabilitation will be at its "weakest where there is little of the sentence remaining to be served", Hilton v. Braunskill, 481 U.S. 770, 777 (1987), any state interest in resuming this defendant's minimal remaining punishment is likewise not a factor making this case any more appropriate for *certiorari* review.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Dated: New York, New York
March 7, 2002

Respectfully submitted,

Georgia J. Hinde

GEORGIA J. HINDE
220 Fifth Avenue, 7th Floor
New York, New York 10001
(212) 727-2717

Counsel for Petitioner